

# Roman-Dutch law in modern South African succession law

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Modern South African succession law adheres to many of the tenets of Roman-Dutch succession law, and present-day South African courts frequently invoke Roman-Dutch authority to address questions regarding contemporary succession law. This article explores the history and current significance of Roman-Dutch law in South African succession law.

## 1 Introduction

Roman-Dutch law, the legal system developed in the Netherlands through the reception (particularly in the sixteenth and seventeenth centuries) of Roman law and its synthesis with Germanic customary law, feudal law and canon law, was introduced at the Cape of Good Hope (present-day Cape Town) by Dutch settlers from the middle of the seventeenth century. English law coalesced with Roman-Dutch law in the aftermath of Britain's occupation of the Cape in 1806. The new British rulers retained Roman-Dutch law, but the law at the Cape came under increased English legal influence as the British pursued an aggressive policy of Anglicisation from 1820 onward. In the result, a mixed legal system developed that spread northward as European settlers moved to the southern African interior.<sup>1</sup>

Roman-Dutch law remains part of South Africa's common law to this day, although, by reason of legislative and judicial adaptation, not consistently in its original form. Many aspects of modern South African private law are governed exclusively by the common law; South African private law is, therefore, particularly infused with Roman-Dutch law. This article highlights the place and role of Roman-Dutch law in contemporary South African succession law. The South African law

of succession provides an excellent example of the mixed nature of the South African legal system because the interplay of Roman-Dutch law and English law has had a particular historical dynamism in this branch of South African private law.

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## 2 Roman-Dutch law and South Africa's mixed legal system

### 2.1 Historical contextualisation

Roman-Dutch law at the Cape of Good Hope was unaffected by the codification movement in continental Europe during the eighteenth and nineteenth centuries. Modern South

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<sup>1</sup> For a concise overview of the development of South Africa's common law and its mixed legal system, see A.B. Edwards, *The History of South African Law – An Outline*, Durban: Butterworths 1996, p. 65-101; R. Zimmermann & D. Visser, 'Introduction: South African Law as a Mixed Legal System', in: R. Zimmermann & D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, Kenwyn: Juta 1996, p. 2-30.

African law remains uncodified and, although statutes regulate many aspects of contemporary South African law, South African courts still rely on the so-called 'old sources' – documented accounts of Roman-Dutch law from particularly the seventeenth and eighteenth centuries – when applying the common law today. These old sources are:<sup>2</sup>

- the works of Roman-Dutch institutional writers such as *Inleidinge tot de Hollandse Rechtsgeleertheyd* (Hugo de Groot, 1583-1645), *Het Roomsche-Hollandsch Recht* (Simon van Leeuwen, 1626-1682) and *Commentarius ad Pandectas* (Johannes Voet, 1647-1713);
- judgments handed down by Dutch courts, particularly those in the province of Holland;
- legal opinions of Dutch jurists regarding practical legal matters contained in compilations such as the *Hollandsche Consultatiën* (compiled from 1645-1666) and the *Nederlands Advijsboek* (compiled from 1693-1698);<sup>3</sup> and
- statutes applicable in Holland and other Dutch provinces.

Statutes – particularly *placaaten* – that applied in Holland prior to the Dutch settlement at the Cape supplemented and extended Roman-Dutch law at the Cape. South African courts have had to determine, from time to

time, whether these statutes remain applicable in modern South African law. In *Spies v Smith*,<sup>4</sup> for example, the point was argued before the South African Appellate Division (now the Supreme Court of Appeal) that article 12 of the *Placaat* of 4 October 1540 (the Perpetual Edict) regarding prohibited testamentary bequests of immovable property by a minor no longer constituted part of South African law. Judge of Appeal Steyn found it unnecessary to decide this point, but nevertheless opined that the article still found application in contemporary South African law.<sup>5</sup>

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British rule at the Cape from 1806 occasioned, despite the retention of Roman-Dutch law by the new British rulers, a significant English law influence on the civilian legal system existent at the Cape. During the century that followed, this influence spread also to the law of the other British colonies in southern Africa (among others, the erstwhile Boer Republics of the Transvaal and Orange Free State that came under British rule after the Anglo-Boer War (1899-1902)). The survival of Roman-Dutch law under British rule in nineteenth-century South Africa is indeed remarkable. According to Van den Bergh this survival can be ascribed to, first, the legal education of a number of colonial jurists at distinguished Dutch universities; secondly, translations of Roman-Dutch texts into English in order to make these accessible to English-speaking jurists; and, finally, the emotional attachment to the Dutch legal heritage of many descendants of the original Dutch settlers at the Cape.<sup>6</sup> Roman-Dutch law's survival, and its coalescence with aspects of English law, yielded the mixed jurisdiction that typifies modern South African law.

## 2.2 Abolition of aspects of Roman-Dutch law under English rule

Certain aspects of Roman-Dutch law did not, however, survive under British rule and were abolished statutorily. The law of succession

2 L. du Plessis, *An Introduction to Law*, Lansdowne: Juta 1999, p. 48.

3 Edwards 1996, p. 63-64.

4 1957 (1) SA 539 (A).

5 551B-C.

6 R. van den Bergh, 'The Remarkable Survival of Roman-Dutch Law in Nineteenth-Century South Africa', *Fundamina* 2012-1, p. 85-87.



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was particularly vulnerable in this regard, as the demise of Roman-Dutch law's universal succession illustrates. Roman-Dutch law prescribed that, upon adiation, the heir succeeded *ex lege* to the deceased's assets and liabilities, and that the heir had to represent and administer the deceased estate. Roman-Dutch law acknowledged the appointment of an executor, but the executor's function was merely to assist the heir in the winding-up of the estate.<sup>7</sup> This practice was entirely foreign to the British, and the Cape Ordinance 104 of 1833 replaced the system of universal succession (and, by implication, repealed all its incidentals such as the *beneficium inventarii*)<sup>8</sup> with the English system of executorship.<sup>9</sup> Under this system the executor takes charge of the deceased estate, collects the debts owed to the estate, pays estate creditors, and distributes the net assets among the deceased's successors. The English-law version of executorship spread beyond the Cape and gained a firm foothold in modern South African law. In *Greenberg v Estate Greenberg*<sup>10</sup> the Appellate Division emphasised the absence of universal succession in contemporary South African law when it acknowledged that a deceased's successors do not acquire ownership of estate assets through succession, but that the executor must transfer ownership to such successors:

'The position under our modern system of administering deceased estates is that when a testator bequeaths property to a legatee the latter does not acquire *dominium* in the property immediately on the death of the testator but what he does acquire is a vested right to claim from the testator's executors ... delivery of the legacy.'<sup>11</sup>

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Forced heirship was part of Roman-Dutch law at the Cape.<sup>12</sup> However, the reservation of fixed portions of deceased estates in favour of certain persons offended the high premium

placed by nineteenth-century English law on testamentary freedom. In the result, all manifestations of forced heirship, such as the legitimate portion<sup>13</sup> as well as the Falcidian and Trebellian fourths,<sup>14</sup> were abolished statutorily under English influence in the four southern African British colonies during the latter half of the nineteenth and early twentieth centuries.<sup>15</sup> Modern South African law is, therefore, devoid of the typical Romanist-Continental forced heirship devices.<sup>16</sup>

South African law nevertheless recognises that a person's indigent minor child, whether born in or out of wedlock, has a common-law claim for maintenance against such person's deceased estate. It is interesting to note that the initial recognition of this claim in *Carelse v Estate De Vries*<sup>17</sup> was based on a judicial misreading of the Roman-Dutch writer Simon van Groenewegen's *De Legibus Abrogatis*.<sup>18</sup> South African courts have, nevertheless, consistently followed the *Carelse* decision, and in *Glazer v Glazer*<sup>19</sup> the Appellate Division confirmed that it has become settled law. The Appellate Division in the *Glazer* case was not, however, willing to extend the *Carelse* court's misreading of Van Groenewegen in order to provide patrimonial protection also for a deceased's surviving spouse.<sup>20</sup> The absence of such protection prompted the South African legislature to enact the Maintenance of Surviving Spouses Act 27 of 1990, under which a deceased's indigent surviving spouse enjoys a statutory maintenance claim for the provision of reasonable maintenance needs until death or remarriage insofar as the surviving spouse is unable to provide for such from own means and earnings.<sup>21</sup> Legislative and judicial intervention in South Africa during the course of the twentieth century has, therefore, obviated any negative economic effect on a deceased's immediate family members that the abolition of Roman-Dutch law's forced heirship by the British might have occasioned.

#### 2.3 The purist movement enhances further Roman-Dutch law's status in contemporary South Africa

After formation of the Union of South Africa in 1910 through the unification of the four British colonies in southern Africa, a 'purist movement' against the 'pollution' of Roman-Dutch law (particularly by English law) further enhanced the status of Roman-Dutch law in South Africa. The so-called 'purists' were legal scholars, university teachers and judges who advocated adherence to the tenets of Roman-Dutch law, and they op-

7 M.M. Corbett, G. Hofmeyr & E. Kahn, *The Law of Succession in South Africa*, Lansdowne: Juta 2001, p. 7.

8 In order to protect an heir from financial ruin through the inheritance of an insolvent estate, Roman-Dutch law permitted the heir to accept the inheritance subject to the benefit of an inventory. The heir's liability for the deceased's debts was then limited to the assets that were inherited: Corbett e.a. 2001, p. 8.

9 Corbett e.a. 2001, p. 8.

10 1955 (3) SA 361 (A).

11 364G. It must be noted that, notwithstanding the court's reference to legatees, the position is the same with regard to heirs.

12 N.J. van der Merwe & C.J. Rowland, *Die Suid-Afrikaanse Erfreg*, Pretoria: Van der Walt en Seun 1990, p. 616.

13 Roman-Dutch law received the Roman law rules regarding the reservation of portions of a deceased estate in favour of some of a deceased's intestate heirs: R.W. Lee, *An Introduction to Roman-Dutch Law*, London: Oxford University Press 1946, p. 369.

14 The prescripts of the *Lex Falcidia* (40 B.C.) and the *Senatusconsultum Trebellianum* (56 A.D.) regarding the reservation of a quarter of a deceased estate in favour of an heir (the Falcidian fourth) and of a quarter of fideicommissary property in favour of the fiduciary heir (the Trebellian fourth) were received into Roman-Dutch law: Lee, 1946, p. 369.

15 Act 23 of 1874 (Cape); Law 7 of 1885 (Natal); Proc 28 of 1902 (Transvaal); Law Book of 1902 (Orange Free State).

16 M.M. Corbett, G. Hofmeyr, H.R. Hahlo & E. Kahn, *The Law of Succession in South Africa*, Lansdowne: Juta 1980, p. 34.

17 (1906) 23 SC 532.

18 Particularly *ad D* 34.1.15.

19 1963 (4) SA 694 (A) 707A.

20 707A-B.

21 Art. 2(1) Maintenance of Surviving Spouses Act.

posed the so-called ‘modernists’ who sought reliance on English law to modernise (what they perceived as) antiquated Roman-Dutch law.<sup>22</sup> Purist jurisprudence was particularly prevalent during the 1950s, and judgments on the law of succession from this period illustrate South African courts’ dynamic move away from earlier reliance on English law to, from the middle of the twentieth century, firm adherence to Roman-Dutch law.

## After formation of the Union of South Africa in 1910 through the unification of the four British colonies in southern Africa, a ‘purist movement’ against the ‘pollution’ of Roman-Dutch law further enhanced the status of Roman-Dutch law in South Africa

South African courts’ engagement with the impact of undue influence on the validity of testamentary dispositions provides an example of this phenomenon.<sup>23</sup> Early South African judgments on testamentary undue influence (from the second half of the nineteenth and the first half of the twentieth centuries) relied greatly on English legal authority. For example, in *Executors of Cerfonteyn v O’Haire*<sup>24</sup> the court cited the English case of *Parfitt v Lawless*<sup>25</sup> in support of its finding that in South Africa, as in England, the party who alleges undue influence bears the burden of proof; moreover, that no presumption of undue influence arises on the basis of any relationship that existed between the deceased and the alleged influencer. In *Taylor v Pim*<sup>26</sup> a South African court cited with approval the English case of *Wingrove v Wingrove*<sup>27</sup> where it was said that, to establish testamentary undue influence, it must be shown that ‘the will of the testator was coerced into doing that which he did not desire to do.’ And in *Finucane v MacDonald*<sup>28</sup> the court opined that the South African legal position on testamentary undue influence accords fully with that espoused in the leading English case of *Craig v Lamoureux*.<sup>29</sup> Engagement with Roman-Dutch authority on testamentary undue influence is conspicuously absent from these judgments.

However, in *Spies v Smith*,<sup>30</sup> a judgment by the Appellate Division handed down during the late 1950s and generally considered the *locus classicus* on testamentary undue

influence in South Africa, the court, in typical purist fashion, contextualised undue influence within South Africa’s Romanist-Civilian common law. Judge of Appeal Steyn commenced his judgment with a reference to the aforementioned case of *Finucane v MacDonald*, and then said:

‘In [*the Finucane*] case ... the Court, without reference to any of our sources of law, proceeded from the premise that the English law regarding “undue influence” in wills corresponds with the principles of our law. It may be that this premise may be proven correct on closer investigation, but it does not absolve me of the duty to examine our sources of law and to decide this matter in accordance with the principles laid down therein.’<sup>31</sup>

The Judge of Appeal’s use of the phrase ‘our sources of law’ is an unambiguous reference to the old sources of Roman-Dutch law because he noted particularly the insistence of Roman-Dutch institutional writers such as Voet<sup>32</sup> and Van Bijkershoek<sup>33</sup> that ‘the pen of the dying must be free’ and that it is *contra bonos mores* to deprive a testator of this freedom.<sup>34</sup> The Judge of Appeal also pointed out these writers’ acknowledgement that not all interferences with expressions of testamentary intent occasion nullity of a testamentary disposition – the interference must have negated a testator’s volition and caused the making of a will contrary to that which the testator intended.<sup>35</sup> Judge of Appeal Steyn then proceeded to decide the factual question before him regarding testamentary undue influence on the aforementioned common-law authority, and without invoking a single English-law source.

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### 3 Roman-Dutch law and modern South African intestate succession law<sup>36</sup>

The States-General of the Netherlands introduced the system of intestate succession under the *Schependomsrecht*, as contained in the Political Ordinance of 1580 and the Interpretation Ordinance of 1594, to the Dutch East Indies and its outstations through

22 Du Plessis 1999, p. 56-61.  
 23 Testamentary undue influence occurs when another person exerts influence over a testator to make a will or testamentary bequest which that testator would not otherwise have made; in other words, the testator’s volition is displaced by that of the influencer: *Spies v Smith* 1957 (1) SA 539 (A) 547C-D.  
 24 1873 Buch 47 72.  
 25 (1872) LR 2 P&D 462.  
 26 (1903) 24 NLR 484 490.  
 27 (1885) 11 PD 81.  
 28 1942 CPD 19 33-34.  
 29 1920 AC 349.  
 30 1957 (1) SA 539 (A).  
 31 545A-B. My translation from the original Afrikaans.  
 32 29.6.1.  
 33 *De Captatoriis Institutionibus*, Cap 10.  
 34 545H.  
 35 546A-548A.  
 36 Intestate succession occurs when a deceased did not leave a valid will or when the deceased’s valid will became inoperative after the deceased’s death (in other words, the will is no longer capable of implementation): M.J. de Waal & M.C. Schoeman-Malan, *Law of Succession*, Wetton: Juta 2008, p. 14.

the *Octrooi* of 1661. The *Octrooi* thus became law also at the Cape of Good Hope, and the South African common law of intestate succession accordingly comprises the rules laid down in the Political Ordinance, the Interpretation Ordinance and the *Octrooi*.<sup>37</sup> The South African legislature subsequently adapted these common-law rules on numerous occasions, among others in regard to the position of a deceased's surviving spouse and the position of a deceased's adopted children. The current Intestate Succession Act 81 of 1987 repealed all the common-law rules and later statutory adaptations, and largely codified South African intestate succession law. Du Plessis has argued that, notwithstanding such codification, the provisions of the Intestate Succession Act still exhibit many of the characteristics of the mixed intestate succession system that typified later Roman-Dutch law. These characteristics include the system of *parentelae* and the associated principle of *het goed klimt niet*;<sup>38</sup> a cognatic system where both male and female descendants can represent another; and a system based on degrees of relationship where, in terms of the Intestate Succession Act, in the third or further *parentelae* those nearest in degree of relationship to the deceased will inherit. In this light, the current Intestate Succession Act's legal-historical roots can be traced, according to Du Plessis, to, among others, the Twelve Tables, classical and post-classical Roman law, Germanic law and Roman-Dutch law.<sup>39</sup>

The common law continues to govern intestate succession matters not regulated by the Intestate Succession Act, and South African courts readily invoke common-law authority to resolve such matters. For example, in *Harris v Assumed Administrator, Estate Macgregor*<sup>40</sup> the Appellate Division had to establish the time of vesting where intestacy supervened after a testator's death in the event that such testator's will became inoperative. Judge of Appeal Joubert commenced his judgment as follows:

'I start with an investigation of the position in our common law, my approach being *melius est petere fontem quam sectari rivulos*.<sup>41</sup>

Judge of Appeal Joubert then investigated, among others, the Institutes of Gaius, the Institutes of Justinian, and thereafter referenced the respective commentaries on Justinian's Institutes of the Roman-Dutch writers Arnoldus Vinnius and Paulus Voet.<sup>42</sup> The Judge of Appeal next identified Hobius van der Vorm as 'the leading Roman-Dutch authority on intestate succession' and attached

particular weight to the view expressed in his *Verhandeling van het Hollandsch, Zeelandsch en de Westvrieslandsch Versterfrecht*:<sup>43</sup>

'Als een testament eerst na dood van den Testateur zyne kracht verliest, men dan niet moet inzien, wie de naaste is geweest tot de successie ten tyde van 't overlyden, maar wie de naaste is ten tyde van 't verval van het testament...'<sup>44</sup>

Based on the foregoing analysis of common-law authority, Judge of Appeal Joubert concluded that the position in modern South African law is that, where a deceased testator left a valid will which took effect on death but which subsequently became inoperative, the intestate estate does not vest retroactively at the date of the testator's death but rather at the time of the will's inoperativeness.<sup>45</sup>

The *Harris* case, therefore, provides a striking example of South African courts' invocation of, among others, Roman-Dutch authority to resolve contemporary intestate succession questions.

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#### 4 Roman-Dutch law and modern South Africa testate succession law<sup>46</sup>

The modern South African law of testate succession typifies the mixed nature of the South African legal system.<sup>47</sup> The diverse wills of Roman-Dutch law were utilised by the Dutch at the Cape from the middle of the seventeenth century and, therefore, became part of the South African common law of testate succession. From the middle of the nineteenth century the British introduced legislation that mirrored the English Wills Act of 1837 in regard to the execution of wills, and the so-called statutory or 'underhand' will became the dominant will form at the Cape. Other southern African British colonies (which later became South African provinces) followed the Cape's example, but different formalities for the execution of the underhand will applied in the various regions. The Wills Act 7 of 1953 achieved uniformity regarding the execution of wills throughout South Africa by, first, abolishing all the then-remaining common-

37 For an overview of the historical background to the South African law of intestate succession, see Van der Merwe & Rowland 1990, p. 21-25.

38 *Parentelae* are orders of succession: the first *parentela* consists of the deceased's descendants; the second *parentela* of the deceased's parents and their descendants; the third *parentela* of the deceased's grandparents and their descendants; and so on. The rule that the estate does not climb applies between the different *parentelae*: any relation in, say, the first *parentela*, even a remote one such as a great-grandchild, prevents devolution of the estate to the deceased's parents in the second *parentela*: Corbett e.a. 2001, p. 564.

39 W. du Plessis, 'Regshistoriese Grondslae van die Wet op Intestate Erfopvolging 81 van 1987', *De Jure* 1990-2, p. 246.

40 1987 (3) SA 563 (A).

41 572G. The maxim means that it is better to seek the sources than to follow the tributaries, or, stated more plainly, that adherence to basic law is essential before exploring exceptions.

42 574I.

43 Judge of Appeal Joubert relied on the 1774-publication of Van der Vorm's work, and referenced particularly the second part regarding intestate inheritance, p. 7, par. 4.

44 574J-575B.

45 575D.

46 Testate succession occurs when the deceased left a valid will. The deceased is referred to as the 'testator' for purposes of testate succession: De Waal & Schoeman-Malan 2008, p. 3.

47 For a concise overview of the mixed nature of the South African law of testate succession, see F. du Toit, 'Succession Law in South Africa – A Historical Perspective', in: K.G.C. Reid, M.J. de Waal & R. Zimmermann (eds.), *Exploring the Law of Succession – Studies National, Historical and Comparative*, Edinburgh: Edinburgh University Press 2007, p. 67-77.

48 Van der Merwe & Rowland 1990, p. 119-120. The Wills Act commenced on

1 January 1954, but was subsequently amended on a number of occasions.

49 A testamentary *fideicommissum* is created when a testator bequeaths property to a beneficiary (the fiduciary) subject to the provision that, after a certain time has elapsed or a particular condition has been fulfilled, the property must go over to a further beneficiary (the fideicommissary). For example, a testator leaves a farm to his son (the fiduciary), and stipulates that, upon the son's death, the farm must go over to his (the testator's) grandson (the fideicommissary): De Waal & Schoeman-Malan 2008, p. 150.

50 A testamentary *modus* is created when an inheritance or a legacy is burdened with a duty imposed on the heir or legatee to do something or not to do something. For example, a testator leaves a farm to his son subject to the obligation that the son must pay a cash amount to his (the testator's) daughter: De Waal & Schoeman-Malan 2008, p. 141.

51 The right of accrual permits a testamentary beneficiary to succeed proportionally to a benefit that a co-beneficiary under the same will cannot take or declines to take. For example, a testator leaves a cash amount to two beneficiaries (with the implication that the amount must be divided equally between the two) and provides that, should either beneficiary predecease the testator, the deceased beneficiary's half must accrue to the surviving beneficiary so that the latter receives the entire amount: De Waal & Schoeman-Malan 2008, p. 200.

52 M.J. de Waal, 'The Uniformity of Ownership, Numerus Clausus and the Reception of the Trust into South African Law', in: J.M. Milo & J.M. Smits (eds.), *Trusts in Mixed Legal Systems*, Nijmegen: Ars Aequi Libri 2001, p. 48, referring to the term used by E. Cameron, 'Why No Constructive Trust In South African Law? The Experience of another Mixed Legal System', paper read at a seminar on constructive trusts

law will forms and, secondly, by regulating uniformly the execution of the underhand will in South Africa and the erstwhile Southwest-Africa (now Namibia).<sup>48</sup>

Whereas English law exerted considerable influence on the South African law of testate succession in regard to the formal aspects of wills, the majority of the testamentary institutions and constructs encountered in modern South African wills (such as the *fideicommissum*,<sup>49</sup> the *modus*,<sup>50</sup> and the right of accrual<sup>51</sup>) originated in Roman law and were received as such into Roman-Dutch law and South African law. A notable exception is the English-law trust that was introduced at the Cape by British settlers during the first half of the nineteenth century. The foreignness of the Common-law trust to South Africa's civilian legal tradition prompted the Appellate Division to attempt a 'Romanist reconfiguration'<sup>52</sup> of the trust by equating the English-law trust to the Roman and Roman-Dutch *fideicommissum* and, commensurately, a trustee to a fiduciary.<sup>53</sup> This equation came under increased judicial and scholarly criticism, and the Appellate Division authoritatively rejected the identification of the trust with the *fideicommissum* in *Braun v Blann and Botha*<sup>54</sup> when it held that it is both historically and jurisprudentially wrong to identify the trust with the *fideicommissum* and to equate a trustee with a fiduciary; instead the court labelled the trust, for purposes of modern South African law, as a legal institution *sui generis*. It must be noted, however, that the South African common law of trusts is infused with principles of Roman and Roman-Dutch law in regard to, among others, the standard of care, diligence and skill expected of trustees (being that of the *bonus et diligens paterfamilias*<sup>55</sup>) and the remedies of trust beneficiaries against trustees in breach of trust (the principal remedy for the recovery of patrimonial loss being the *actio legis Aquiliae*<sup>56</sup>).

The judgment of the Appellate Division in *Du Plessis v Strauss* provides a telling example of contemporary South African courts' firm adherence to Roman-Dutch law when resolving testate succession matters regarding the content of wills

The judgment of the Appellate Division in *Du Plessis v Strauss*<sup>57</sup> provides a telling example of contemporary South African courts' firm adherence to Roman-Dutch law when resolving testate succession matters regarding the content of wills. In this case the court had to determine whether a testator's use of a *si sine liberis decesserit* clause with regard to a fiduciary under a testamentary *fideicommissum* (a clause bearing reference to the death of the fiduciary without being survived by children) created a tacit *fideicommissum* in favour of the children that such fiduciary did indeed leave. Judge of Appeal Van Heerden conducted a thorough investigation of Roman-Dutch authority and concluded that it was the practice in Holland during the seventeenth and eighteenth centuries that a *sine liberis* clause, coupled to a conditional fideicommissary substitution, created a presumption that the testator established a tacit *fideicommissum* in favour of the *liberi* (children) who are the testator's descendants. The Judge of Appeal found fortification for this view in particularly Cornelis van Bijkershoek's *Observationes Tumultuariae*, a collection of judgments of the *Hoge Raad*.<sup>58</sup> Judge of Appeal Corbett, who handed down a concurring judgment in the *Du Plessis* case, addressed earlier South African court cases in which a different view on a testator's use of a *sine liberis* clause was expressed, and he stated emphatically:

'Preference must be given to the [law of Holland] since Holland is from where our common law derives ... I accept the law of Holland, as propounded by my Brother Van Heerden. And I agree that the South African case law should not be permitted to override the law of Holland.'<sup>59</sup>

The approach of *petere fontes* – going back to the primary sources of South Africa's Roman-Dutch common law – evident in the *Harris* judgment on intestate succession, is, therefore, equally discernable in the *Du Plessis* judgment on testate succession.

## 5 Roman-Dutch law and South African succession law under the Constitution, 1996

The Constitution of 1996 is the bedrock of post-apartheid South Africa and constitutes, according to its first Chapter, the supreme law of South Africa.<sup>60</sup> The Constitution has reshaped fundamentally the South African legal landscape over the past two decades, and it is arguable that the shift towards constitutional jurisprudence during this period occasioned a commensurate de-

crease in South African courts' reliance on common-law authority.<sup>61</sup> The Constitution nevertheless recognises South Africa's common law and directs South African courts to apply and develop the common law when invoking a provision of the Constitution's Bill of Rights<sup>62</sup> in regard to any natural or juristic person; moreover, it permits courts to develop common-law rules to limit the application of any right contained in the Bill of Rights.<sup>63</sup>

The Bill of Rights applies to all law in South Africa,<sup>64</sup> also to private law and, thus, to the law of succession. It is, therefore, unsurprising that the Bill of Rights, especially its directives on equality and anti-discrimination,<sup>65</sup> has been invoked on a number of occasions during the post-constitutional era to challenge testamentary dispositions. In one such case, *Minister of Education v Syfrets Trust Ltd*,<sup>66</sup> the court chose to decide the matter in terms of the common law, but with due cognisance of the constitutional framework within which the South African common law currently operates.

The *Syfrets Trust* case concerned a challenge to a bursary bequest made under a charitable trust established in terms of a will and codicil executed in 1920 that limited bursary recipients to university students 'of European descent only' and excluded expressly 'persons of Jewish decent (sic), and females of all nationalities.'<sup>67</sup> The challengers averred that the bequest's exclusive nature amounted to unfair discrimination, and they prayed that the aforementioned limitations imposed by the testator be struck from the will. The challengers advanced, among others, the direct application of the Constitution's equality and anti-discriminatory provisions as well as the common law, which prohibits testamentary bequests that are illegal, immoral or contrary to public policy, as grounds for the challenge.<sup>68</sup>

Judge Griesel chose to decide the matter 'on the basis of the existing principles of the common law, having proper regard to "the spirit, purport and objects of the Bill of Rights".'<sup>69</sup> The judge acknowledged that freedom of testation lies at the heart of the South African common law of testate succession,<sup>70</sup> but he also recognised that freedom of testation has never been absolute or unfettered – the common law places various restrictions on this freedom. The restriction pertinent to the matter before the *Syfrets* court prescribes that courts will not give effect to testamentary directions that are con-

trary to public policy: judge Griesel said that public policy 'is a well-recognised common-law ground limiting the principle of freedom of testation and has been applied since Roman times.'<sup>71</sup> The judge next acknowledged that public policy in contemporary South Africa is rooted in the Constitution and the fundamental values it enshrines, and then proceeded to show that the limitations in regard to race, religion and gender contained in the disputed will indeed occasioned unfair discrimination in the constitutional sense and were, therefore, contrary to public policy.<sup>72</sup> He concluded:

'It follows, in my judgment, that this Court is empowered, in terms of the existing principles of the common law, to order variation of the trust deed in question by deleting the offending provisions from the will.'<sup>73</sup>

Judge Griesel cautioned that his decision to order the striking-out of the disputed provisions does not bring about the negation of freedom of testation but that 'it simply enforces a limitation on the testator's freedom of testation that has existed since time immemorial.'<sup>74</sup> I have argued that this legal-historical contextualisation by judge Griesel places the question of the limitation of freedom of testation under public-policy imperatives in post-constitutional South Africa squarely within the realm of South Africa's Romanist-Civilian common law,<sup>75</sup> and it thus underscores the continued importance of Roman-Dutch law for South African succession law under the Constitution.

## Contemporary South African courts' continued reliance on the old sources of Roman-Dutch law, among others, when addressing questions in the law of succession, entrenched, and continues to secure, a place for Roman-Dutch law in modern South African law

### 6 Outlook

It has been said that modern South African law is, arguably, more Roman-Dutch than modern Dutch law itself.<sup>76</sup> This article has shown that contemporary South African courts' continued reliance on the old sources

organised by the Universities of Edinburgh and Strathclyde and the Scottish Law Commission, 19 October 1996, p. 9.

53 *Estate Kemp v McDonald's Trustee* 1915 AD 491 499.

54 1984 (2) SA 850 (A) 859E-F.

55 *Sackville West v Nourse* 1925 AD 516 519-520.

56 *Yorkshire Insurance Co Ltd v Barclays Bank (Dominion, Colonial & Overseas)* 1928 WLD 199 206-207. The *Lex Aquilia* (287 B.C.) regulated liability for patrimonial damage in Roman law, and was received (and subsequently extended) in Roman-Dutch law: J. Neethling & J.M. Potgieter, *Law of Delict*, Durban: LexisNexis 2010, p. 8-9.

57 1988 (2) SA 105 (A).

58 138B-G.

59 149E and 150G.

60 Art. 2.

61 A cursory search of the online South African law reports on [www.jutalaw.co.za](http://www.jutalaw.co.za) (last accessed on 5 May 2013) revealed that, between 1975 and 1993 (the two decades preceding democratic constitutionalisation in South Africa), reported judgments contained around 1010 references to Johannes Voet and about 116 references to Hugo de Groot. The corresponding number of references to these two leading institutional writers from 1994 to mid-2013 (the two decades following the establishment of full constitutional democracy in South Africa) approximated 472 with regard to Voet and 55 with regard to De Groot. This statistic suggests, at least *prima facie*, that constitutional authority supersedes reliance on common-law sources in South Africa's post-apartheid constitutional dispensation.

62 The Bill of Rights is contained in the Constitution's ch. 2.

63 Art 8(3). See also art. 173.

64 Art 8(1).

65 Art 9.

66 2006 (4) SA 205 (C).

67 Par. 1.

68 Par. 9.

69 Par. 16.

70 Par. 17.

71 Par. 23.

72 Par. 47.

73 Par. 47. My emphasis added.

74 Par. 48.

75 F. du Toit, 'Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa's Mixed Jurisdiction?', *Tulane European and Civil Law Forum* 2012, p. 124.

76 Du Plessis 1999, p. 48.

of Roman-Dutch law, among others, when addressing questions in the law of succession, entrenched, and continues to secure, a place for Roman-Dutch law in modern South African law. Roman-Dutch law has also established a place and role for itself in South Africa's post-apartheid constitutional dispensation where justice, equality and fairness have become important values. This assertion is illustrated strikingly by the South African Constitutional Court's observation in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*<sup>77</sup> where judges Froneman and Cameron referenced contemporary South African scholarship on Roman-Dutch law and then said:

'Roman-Dutch law was a "rational, enlightened system of law, motivated by considerations of fairness" which combined "the wisdom of the Roman law jurists with the idealism of the Dutch scholars" ... in virtually every aspect of Roman-Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness.'<sup>78</sup>

It is submitted that, in light of this acknowledgment by the Constitutional Court on the inherently equitable nature of Roman-Dutch law, South African law, and its law of succession in particular, will in future remain true to its Roman-Dutch legal heritage, and that this historical connectedness with Civil Law will stand South African law in good stead as it seeks to meet twenty-first century legal challenges in the domestic, African and international contexts.

77 2011 (3) SA 274 (CC).  
78 Par. 198.